18-857

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~424~~. 208

LEWIS H. HERSHFIELD AND ABRAHAM HANAUER, APPELLANTS,

vs.

JOSEPH GRIFFITH AND WILLIAM THOMPSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED SEPTEMBER 24, 1872.

OCT. 2. 1872

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1 *Statement on appeal.*

TERRITORY OF MONTANA,
Lewis & Clarke County:

In third judicial district.

JOSEPH GRIFFITH & WILLIAM THOMPSON
vs.
SOLOMON STARR, JOHN HERMAN, DEFENDANTS; & L. H. Hershfield & A. Hanauer, interveners.

This action was commenced in the district court aforesaid, by the plaintiffs, against the defendants Starr & Herman, to foreclose a mortgage by filing a complaint on the 18th day of June, 1867, which said complaint is in the words & figures following, to wit:

JOSEPH GRIFFITH & WILLIAM THOMPSON, partners doing business under the firm-
2 name & style of Griffith & Thompson, pl'ffs,
versus
SOLOMON STARR AND JOHN HERMAN, PARTNERS under the name, firm, & style of Herman & Starr, def'ts.

In the 3rd judicial district court within and for Jefferson County, attached to Edgerton County for judicial purposes, Montana Territory.

The above-named plaintiffs, by Word & Spratt, their attorneys, complain of the above-named defendants, and state that the said plaintiffs, on and prior to the 17th day of October, A. D. 1866, at the county and Territory aforesaid, were partners in the trade and business of builders and contractors, and doing business as such under the name, firm, & style of Griffith & Thompson; and that, on the day and year last aforesaid, & prior thereto, the said defendants Solomon Starr and John
3 Herman were partners in the building and construction of a stamp quartz-mill, situated in Jefferson County, Montana Territory, under the name, firm, and style of Herman & Starr.

That, on the day and year last aforesaid, at the Territory aforesaid, in consideration that the said plaintiffs had built and constructed for the said defendants at their special instance and request, the said quartz-mill, and upon a full settlement of their said accounts pertaining thereto, there was found due and owing to the said plaintiffs, by and from the said defendants, the sum of ninety-three and one-half ounces, in good merchantable gold-dust; and thereupon the said defendants, on the said 17th day of October, 1866, at the county of Madison and Territory of Montana, made and executed and delivered to plaintiffs their cer-
4 tain writing, or promissory note in writing, (herewith filed,) whereby they acknowledge themselves to owe and be indebted to plaintiffs, and therein promised to pay the said plaintiffs ninety-three and one-half (93½) ounces of good merchantable gold-dust, with interest thereon at the rate of four and two-thirds ounces per month, in like merchantable gold-dust, from date until paid.

That the said defendants, for the purpose of securing the payment of

said note, executed and delivered to plaintiffs a mortgage deed, (which is herewith filed and made a part of this complaint,) conveying to plaintiffs all their right, title, claim, and interest in and to one certain fifteen (15) stamp quartz-mill, located in Pipestone district, on Pipestone Creek, in Jefferson County, Montana Territory, as known and described in said mortgage deed, which said mortgage was, by the further
5 terms thereof, to be void, upon the condition that the said defendants paid said promissory note and interest, according to the true intent and meaning thereof; but to pay or deliver the said gold, or any part thereof, or any interest accruing thereon, the said defendants have wholly failed and refused, although often requested so to do, and that said mortgage is in full force and effect, and unsatisfied in whole or in part. Plaintiffs aver that, on the 10th day of November, 1866, and at divers other times since, at the county and Territory last aforesaid, he demanded of and from defendants the said gold-dust, specified in said promissory note and mortgage, and then and there requested defendants to pay and deliver the same; but to deliver the said gold-dust so due and owing thereon, or any part thereof, the said defendants then
6 and there, and ever since, has failed and refused.

Plaintiffs further aver that said gold now due on said note and mortgage, was then and is now of the value of ($2,770.60) twenty-seven hundred and seventy dollars and sixty cents, for which said sum, with the rate of interest specified in said note and mortgage, plaintiffs demand judgment. Plaintiffs further pray that, by the further judgment or decree of this court, *that* the equity of redemption of the said defendants in and to said quartz-mill, with the privileges and appurtenances thereto belonging, may be forever barred and foreclosed, and that the same may be sold, as the law has in such cases made and provided, to pay off and discharge any judgment rendered herein; and for other proper relief.

WORD & SPRATT,
Att'ys for Plaintiffs.

7 VIRGINIA CITY, MONTANA TERRITORY,
October 17th, 1866.

Due Griffith & Thompson, or order, for ballance due for building quartz-mill, as per settlement this date, the amount of ninety-three and one-half ounces (93 & ½ oz.) in good merchantable gold-dust, and the amount of four and two-thirds ounces (4 & ⅔ oz.) per month additional, in merchantable gold-dust, from date until paid.

HERMAN & STARR.

[$1.00 U. S. rev.-stamp, cancelled.]

Secured by mortgage on said quartz-mill, bearing even date herewith, and filed for record November 10th, 1866, in Jefferson County.

To which complaint the defendants, Herman & Starr, filed their answer in the words and figures following, to wit:

8 "B."

GRIFFITH & THOMPSON
vs.
S. STARR, IMPL'D WITH J. HERMAN.

And now comes the defendant Starr by Chumasero and May, his attorneys, and, for answer to said complaint of plaintiffs, says that he denies—

1st. Each and every allegation of plaintiffs' complaint.

2nd. Denies the execution and delivery of said note and mortgage to plaintiffs.

3rd. Denies that said note and mortgage is of any validity, but alleges that the same are, upon their faces, illegal and void.

4. Denies any indebtedness of any kind or amount whatever to plaintiffs.

9 5. Denies that any demand was ever made upon defendants to pay gold-dust or anything else upon the said note or mortgage.

6. Denies that 93½ oz. of gold-dust, with the interest claimed thereon in said complaint, is of the value of $2,770.60.

Wherefore def't Starr asks for judgment for defendants against said plaintiffs for their costs.

CHUMASERO & MAY,
Attorneys for Starr.

And, afterwards, to wit, on the first day of July, 1867, the interveners, L. H. Hershfield and A. Hanauer, filed their petition to intervene in said cause, which is in the words following:

TERRITORY OF MONTANA,
Edgerton County:

In the 3rd judicial dist. court in and for said county & Territory, July term, 1867.

10 "C."

GRIFFITH & THOMPSON
vs.
HERMAN & STARR.

To the Honorable L. E. Munson, judge of said district court:

Your petitioners represent that they, Lewis H. Hershfield & A. Hanauer, are partners in business under the name, firm, and style of L. H. Hershfield & Co.; and that, on the 8th day of November, A. D. 1866, the defendants in this suit were justly indebted to these petitioners in the sum of not less than five thousand dollars; and that, heretofore, they had, at the request and for the accommodation of said defendants, endorsed and became liable to pay a certain note, executed and delivered by said defendants to one J. M. Ryan, for three hundred and thirty-three
11 ounces six and one-half pennyweights and four grains of clean bankable gold-dust, which was of the value of eight thousand dollars; and that, to secure the payment of the said indebtedness, as well as for the purpose of indemnifying these petitioners from loss on account of their said endorsements, the said defendants, on the said 8th day of November, executed and delivered to them a certain deed, bearing date on the said day, in and by which said deed the said defendants conveyed to them all of the property mentioned, described, and set forth in the said complaint in this cause; which said deed of conveyance was, as soon thereafter as the same could be done, recorded in the recorder's office in and for the county of Jefferson, in said Territory, that being the county in which all of the said property was situated; and they
12 further state that, afterwards, to wit, on or about the 8th day of February, 1867, they were compelled, as such endorsers, to pay,

and did pay, the said note, amounting to the sum of nine thousand four hundred and forty dollars; and that, in the month of January, 1867, these petitioners made further advances, to said defendants, of the sum of two thousand five hundred dollars, in money; and that the said Herman and Starr are now justly indebted to these petitioners, in the sum of sixteen thousand nine hundred and forty dollars, with interest thereon at the rate of six per cent. per month from the respective dates of such indebtedness, over and above all just credits and set-offs; and they further say that the only security that they have, for the repayment of the same, is the deed of said property above mentioned.

13 And they further say that they have never had notice, either constructive or actual, of the existence of the instrument, called a mortgage, and which is set forth in the complaint of said plaintiffs; and that they, these petitioners, are the prior incumbrancers of said premises in said complaint mentioned and set forth.

And they further say that the said instrument called a mortgage, so set forth as aforesaid in said complaint, is void as against these petitioners, and of no force or effect either in law or equity.

And these petitioners further deny that any valid mortgage was executed and delivered by said defendants to the plaintiffs in this suit, or recorded in the proper recorder's office, prior to the date of the said deed, or that, if there was, *that* the same was ever recorded so as to charge

14 them with notice thereof.

Wherefore they pray the court that they may be made parties to the said suit, and that they may be permitted to come in and contest the claim of said plaintiffs in this suit; and that, on a final hearing in this case, they may be declared to be the prior incumbrancers of the said premises to the extent of their said demand against said defendants, to wit, the sum of sixteen thousand nine hundred and forty dollars, with interest thereon as aforesaid.

And that they may have judgment therefor against the said defendants, and that the said judgment may be decreed to be prior to plaintiff's' claim, if any they have; and further, that said claim of said plaintiffs, if anything is actually due to them from said defendants,

15 may be subjected to their said demand, and that the said premises may be decreed to be sold, and from the avails and proceeds of such sale your petitioners may be first paid the amount so due to them, with their costs and charges; and the surplus, if any, be disposed of by this court as may be agreeable to equity.

CHUMASERO & MAY,
Att'ys for Petitioners.

And, afterwards, to wit, on the 30th day of March, 1868, the plaintiffs filed their answer to the petition of said interveners as follows, to wit:

TERRITORY OF MONTANA,
Lewis & Clarke County:

3rd judicial dist. court.

"D."

GRIFFITH & THOMPSON, PL'FFS,
vs.
HERMAN & STARR, DEFENDANTS.

16 The plaintiffs, for answer to the petition to the intervenors herein, deny that, on the 8th day of November, 1866, the defend-

ants in the above suit were justly indebted to the petitioners in the sum of not less than five thousand dollars, or any other sum.

2. Deny that, for the accommodation of the defendants, the said intervenors endorsed and became liable to pay a certain note, executed and delivered by said defendants to one J. M. Ryan for three hundred and thirty-three ounces six and one-half pennyweights and four grains of clean bankable gold-dust, which was of the value of eight thousand dollars.

3. Deny that, on the 28th day of November, the above defendants, for the purpose of securing the aforesaid indebtedness, executed and
17 delivered to the said intervenors a certain deed bearing date on the said day aforesaid, and thereby conveyed to them all the property mentioned and described in the said complaint in this cause.

4. Deny that, as soon thereafter as could be done, the said deed was duly recorded in the recorder's office in and for the county of Jefferson.

5. Deny that, on or about the 3rd day of February, 1867, they were compelled as such endorsers to pay, and did pay, the said note, amounting to nine thousand four hundred and forty dollars.

6. Deny that, in the month of January, A. D. 1867, the said intervenors made further advances to defendants amounting to two thousand five hundred dollars.

7. Deny that, Herman & Starr are now justly indebted to said
18 intervenors, Hershfield & Hanauer, in the sum of sixteen thousand nine hundred and forty dollars, with interest thereon at the rate of six per cent. per month from the respective dates of such indebtedness.

8. Deny that said intervenors never had notice, either constructive or actual, of the existence of the mortgage of plaintiffs, and deny that the said intervenors are the prior incumbrancers of the said premises mentioned in plaintiffs' complaint.

9. Deny that plaintiffs' mortgage is void as against the intervenors aforesaid.

10. Deny that the said intervenors are entitled to the relief demanded.

WORD & SPRATT & WOOLFOLK,
PEMBERTON & TOOLE,
Att'ys for Plaintiffs.

19 And, afterwards, to wit, on the 15th day of April, 1868, this cause came on to be heard upon the pleadings and evidence, before Hon. L. E. Munson, judge of said court, and a jury. On the trial the plaintiffs offered in evidence a mortgage which is in the words and figures following, to wit:

"E."

This indenture, made the seventeenth (17) day of October, in the year of our Lord eighteen hundred and sixty-six, between Herman and Starr, of Virginia City, county of Madison, and Territory of Montana, parties of the first part, and Griffith & Thompson, of the same place, parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum one (1.00) dollar to them
20 in hand paid by the said parties of the second part, do grant, bargain, sell, and confirm unto the said parties of the second part, and to their heirs and assigns forever, all our right, title, and interest in and to one certain fifteen (15) stamp quartz-mill, located in Pipestone district, and on Pipestone Creek, erected by the parties of the

second part for the said parties of the first part, said property being in Jefferson County, Territory aforesaid, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining. This conveyance is intended as a mortgage to secure the payment of the sum of ninety-three and one-half ounces ($93\frac{1}{2}$) in good merchantable gold-dust, and the amount of four and
21 two-thirds ounces ($4\frac{2}{3}$) per month additional in merchantable gold-dust, from date until paid, according to one certain due-bill bearing even date herewith, given by the parties of the first part to the parties of the second part; and these presents shall be void if such payment be made; but in case default be made in the payment of the principal or interest, as above provided, then the parties of the second part, their executors, administrators, and assigns, are hereby empowered to sell the premises above described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law; and, out of the money arising from such sale, to retain the said principal and interest, together with the costs and charges of making such sale, and the overplus,
22 if any there be, shall be paid by the party making such sale, on demand, to the parties of the first part, their heirs, or assigns.

In witness whereof the said parties of the first part have hereunto set their hands & seals the day and year first above written.

JOHN HERMAN. [SEAL.]
SOL. STARR. [SEAL.]

Signed, sealed, & delivered in the presence of—

TERRITORY OF MONTANA,
County of Madison, ss:

On this eighth day of November, A. D. one thousand eight hundred and sixty-six, before me, Ben. S. Word, a notary public in and for said Madison County, duly commissioned and sworn, personally appeared the within-named John Herman and Sol. Starr, whose names are subscribed to the foregoing instrument as parties thereto,
23 personally known to me to be the individuals described in and who executed the said foregoing instrument, and who acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[L. S.] BEN. S. WORD, *Notary Public.*

[$2 rev.-stamp, cancelled.]

And endorsed on the foregoing mortgage is the following, in words and figures, to wit:

"Mortgage. Herman & Starr to Griffith & Thompson. Recorded at request of . Filed for record November 10th, A. D. 1866, at 12 o'clock m. Recorded in book A, on page 29, of the records of Jef-
24 ferson County. Frank Wells, co. recorder. Filed June 18th, 1867. Cha's W. Fowler, clerk."

To the introduction of which the intervenors made objection, on the ground that the same was not sufficiently stamped, nor was there sufficient evidence that the same had been recorded, which objections were overruled by the court, and said deed was admitted pro forma, and the said intervenors, by their counsel, then and there excepted. The plaintiffs then offered in evidence a certified copy of said mortgage, which is as follows, to wit:

"F."

This indenture, made the seventh (7th) day of October, in the year of our Lord eighteen hundred and sixty-five, between Herman &
25 Star, of Virginia City, county of Madison, and Territory of Montana, parties of the first part, and Griffith and Thompson, of the same place, parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one (1.00) dollar to them in hand paid by the said parties of the second part, do grant, bargain, sell, and confirm unto said parties of the second part, and to their heirs and assigns forever, all our right, title, and interest in and to one certain fifteen (15) stamp quartz mill, located in Pipestone district, and on Pipestone Creek, erected by the parties of the second part for the said parties of the first part, said property being in Jefferson County, Territory aforesaid, together with all and singular the tene-
ments, hereditaments, and appurtenances thereunto belonging or
26 in anywise appertaining. This conveyance is intended as a mortgage to secure the payment of the sum of ninety-three and one-half ounces (93½) in good merchantable gold-dust, and the amount of four and two-thirds oz. (4 & ⅔ ozs.) per month additional in merchantable gold-dust, from date until paid, according to one certain due-bill, bearing even date herewith, given by the parties of the first part to the parties of the second part; and these presents shall be void if such payment be made; but in case default be made in the payment of the principal or interest as above provided, then the parties of the second part, their executors, administrators, and assigns, are hereby empowered to sell the premises above described, with all and every of the appurte-
nances or any part thereof, in the manner prescribed by law; and,
27 out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the parties of the first part, their heirs and assigns.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above-written.

JOHN HERMAN. [SEAL.]
SOL. STAR. [SEAL.]

Signed, sealed, & delivered in the presence of—

[U. S. rev. stamp, $2.00, cancelled.]

TERRITORY OF MONTANA,
County of Madison, ss:

On this eighth day of November, A. D. one thousand eight hun-
28 dred and sixty-six, before me, Ben. S. Word, a notary public in and for said Madison County, duly commissioned and sworn, personally appeared the within-named John Herman and Sol. Star, whose names are subscribed to the foregoing instrument as parties thereto, personally known to me to be the individuals described in and who executed the said foregoing instrument, and who acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above-written.

[NOTARIAL SEAL.] BEN. S. WORD,
Notary Public.

29 Recorded November 10th, A. D. 1866, at 12 o'clock m.
FRANK WELLS, *Co. Rec.*
Per J. N. WELLS, *Deputy.*

JEFFERSON COUNTY,
Montana Territory, ss :

I, Frank Wells, recorder in and for said county, do hereby certify that the foregoing is a true and correct copy of a mortgage on record in my office in book "A," on pages 29 & 30, of the records of said Jefferson County.

In testimony whereof I have hereunto set my hand and affixed the seal of said county this 4th day of April, A. D. 1868.

[L. S.] FRANK WELLS,
County-Recorder.

[5-c't stamp, rev., cancelled.]

To the introduction of which the said intervenors then and
30 there excepted, for the reasons mentioned in the objection to the introduction of the original mortgage, which objection was overruled by the court, and to which ruling the said intervenors then and there excepted.

And the said mortgage and certified copy thereof were then and there read in evidence to the jury.

The plaintiff then called as a witness WILLIAM THOMPSON, who, being sworn, said that he was one of the plaintiffs above-named, and that the plaintiffs contracted with the defendants, Herman and Star, to build a quartz-mill for them; that they did build such quartz-mill, and that after the same was built there was a settlement between them, and on such settlement there was found to be due them from defendants sixteen hundred and eighty-three dollars in gold-dust; that the
31 defendants, Herman and Star, thereupon executed the mortgage referred to in the complaint and read in evidence, to secure the said sum so found due; that said mortgage was taken to secure the said indebtedness.

The plaintiffs then asked the witness what was the reason why they did not file a mechanic's lien on said property in said complaint mentioned, which question was objected to by the intervenors. The objection was overruled by the court, and the defendants then and there excepted.

The witness answered, because we had received the mortgage as security for this note—I refer to the mortgage we are now trying to foreclose in this suit. Witness further stated that the mortgage was made the day before it was executed, and that it should have been dated the day before it was acknowledged; that the date should have been 7th
32 November, instead of 7 October, 1866; that he was not present when the mortgage was signed; that the note had been signed and was dated back to the day of the settlement.

The plaintiff then asked the following questions which were objected to by intervenors, and the objection was overruled. The intervenors then and there excepted to such overruling of said objection, and which questions and answers are as follows, to wit:

"G."

"These were questions asked by plaintiff, on the trial, which were objected, and allowed to be answered, and are lost."

The plaintiffs then rested their case.

The intervenors then called A. HANAUER, as a witness, who, being sworn, testified that the defendants, Herman & Star, were in-
33 debted to them upon the following items of indebtedness, to wit: 333 oz. 6½ p'w'ts 4 gr's.

VA. CITY, M. T., *Nov. 8th*, 1866.

Four months after date, we promise to pay James M. Ryan, or order, three hundred and thirty-three ounces six and one-half pennyweights and four grains of clean bankable gold-dust, for value received, and the additional sum of twenty ounces of bankable gold-dust per month, for the use of the same from date until paid, the latter amount to be due and payable monthly at the end of each month.

JOHN HERMANN.
SOLOMON STAR.

Witness: W'M ELLINGER.

[6 $1 rev. stamps, cancelled.]

And endorsed on the following note is the following, in words and figures, to wit:

34 "Received, March 4th, 1867, two hundred and twenty-six ounces and eight d'w'ts, (226 oz. 8 d'w'ts,) on the within, of L. H. Hershfield & Co., in clean gold-dust, at $18.00 per oz.

"JAMES M. RYAN."

"Received payment in full.

"JAMES M. RYAN."

$2,000.00 c'y.]

VIRGINIA, MONTANA, *March 1st*, 1867.

L. H. HERSHFIELD & CO., *Bankers:*

Pay to self two thousand dollars.

JOHN HERMANN & STAR.

[2 c. rev. stamp, cancelled.]

Hermann & Star to L. H. Hershfield & Co.

1867.		
Feb'y 8th.	To bill of m'd'se.....	$201 83
	Dust.....	
Virginia City, July 10th, 1867, prem.....		50 45
		$252 28

And that the note was one which had been endorsed by the in-
35 tervenors for the accommodation of the defendants, and which was paid by said intervenors. That the deed, of which the following is a copy, (and which was then read in evidence:)

"H."

Know all men by these presents that we, John Herman and Solomon Star, have this day, for and in consideration of the sum of eight thousand dollars in bankable gold-dust, in hand paid, the receipt whereof is hereby acknowledged, bargained and sold unto L. H. Hershfield & Co., of Montana Territory, the following-described property, lying and being

in Jefferson County, Montana Territory, to wit: one fifteen-stamp quartz-mill in running order, with three extra sets of shoes and dies; 3 extra collars, & 3 extra cams; one complete set of blacksmith
36 tools, also mining-tools, such as picks, shovels, &c.; eight mules and harness, 2 yoke of good-size cattle, and 3 wagons; and the following-described mining-property, to wit: discovery-claim & No. one (1) west, & the west half of No. one (1) east—in all 500 feet, on the Lyon lode; No. (2) two east, and the east half of No. (1) one west, being 300 feet on the Lady Abbott lode he east fifty feet of No. (3) three east, and the west fifty feet of No. 4 ast, on the Geneva lode; No. (2) two west, and an undivided half of the west half of discovery, and the east half of No. (1) one west, on the Emigrant lode; also an undivided half of No. (4) four west, on the Clipper lode; each claim consisting of 200 feet: To have and to hold the above-described property unto them, the said L. H. Hershfield & Co., their heirs and assigns forever.

37 In witness whereof we have hereunto set our hands and seals this 8th day of November, 1866.

JOHN HERMAN. [SEAL.]
SOL. STAR. [SEAL.]

MADISON COUNTY,
Montana Territory, ss:

On this 8th day of November, A. D. 1866, before me, a notary public in and for said Territory, personally came John Hermann & Sol. Star, to me well known to be the same persons who executed the foregoing instrument of writing, and who acknowledged to me that they executed the same, freely and voluntarily, and for the uses and purposes therein mentioned.

Witness my hand & official seal the day above-written.

[L. S.] BEN. S. WORD,
Notary Public.

[$8 rev. stamp, cancelled.]

38 TERRITORY OF MONTANA,
County of Jefferson:

I, Frank Wells, county clerk and ex-officio recorder of said county of Jefferson, do hereby certify that the deed hereto foregoing was, on the 14th day of November, A. D. 1866, at 5 o'clock p. m. of that day, filed for record in the recorder's office of said county, and duly recorded in book "F," on page 602, of the records of Jefferson County, Territory aforesaid.

In witness whereof I have hereunto set my hand and affixed the seal of said county, this 30th day of March, A. D. 1868.

FRANK WELLS,
County Clerk & Recorder.

And endorsed on the back of said foregoing deed is the following, in words & figures, to wit:

39 "Hermann & Star, to L. H. Hershfield & Co." Filed for record November 14th, A. D. 1866, at 5 o'clock p. m. Recorded in book "F," on page 602, of the records of Jefferson County. Frank Wells, co. recorder.

Was executed to secure the indebtedness of said defendants to said intervenors, and that the amount of such indebtedness at the date of this trial was $17,402.38.

The witness then testified that the deed was intended as security for the payment of the indebtedness of said defendants to the intervenors. The witness further testified that, in the months of October and November, 1866, he was a banker in Virginia City, Montana Territory, and was, during that time, dealing in buying and selling gold-dust for
40 United States legal-tender notes and currency; and that, during the said months of October and November, gold-dust was worth from $22.50 to $24 per ounce; and that, during that period, $22.50 was the minimum value of such gold-dust.

The intervenors then moved the court to exclude the said mortgage from the consideration of the jury, which motion was overruled by the court, and the intervenors, by their counsel, then and there excepted.

The intervenors then rested their case.

The plaintiffs then recalled W'M THOMPSON, who further testified that, at the time of the settlement and execution of said note and mortgage, the plaintiffs estimated gold-dust at twenty-two dollars per ounce in currency. The case was then, after argument, submitted to
41 the jury under the following charge, to wit:

"I."

Charge to the jury.

GRIFFITH & THOMPSON
vs.
HERMAN & STAR ET AL.

GENTLEMEN OF THE JURY: The plaintiffs bring this action to foreclose a mortgage given them by Hermann & Star, on the 8th of November, 1866, to secure a note, dated the 17th of October, 1866; and, so far as this action is concerned, their claim stands before you the same as though the note had been given for merchandise, money loaned, or any other lawful indebtedness.

The question of mechanic's lien or superior equities, claimed to be the foundation of the claim, which has been discussed or claimed to some extent during the progress of the trial, cuts no figure in the case
42 one way or the other, beause no lien was secured; but the mortgage was taken, & that is the security now being enforced before you, & not a mechanic's lien or its incidents. You will, therefore, disregard & lay out of the case all evidence & claims of a superior equity, because the party plaintiffs took a mortgage when he might have had a mechanic's lien. No mechanic's lien was taken or secured, & no rights incident thereto attach to this mortgage not common to other mortgages to secure promissory notes of similar import to those in evidence; and, as I before said, this case will stand upon the note & mortgage the same as though the note had been given for borrowed money, merchandise, or any commodity or consideration the lawful subject of purchase or contract.

The intervenors, Hershfield & Co., come in and set up claim to
43 this property by virtue of a conveyance to them to secure a demand for money advanced, & to be paid by installments or indorsements, for the use and benefit of defendants after date of conveyance to intervenors, and they say the plaintiffs ought not to have the prayer of their complaint answered by your verdict in their behalf, because they say they have prior rights and equities to the plaintiffs in the property sought to be foreclosed.

The court instructs you that, so far as the equity considerations of the two cases are conserned, they are alike, both being upon promissory notes, and that leaves the question as to priority of rights under the conveyances to you for decision.

Upon this point I do not remember that either party has given
44 any direct testimony as to the time of day the deeds were executed and delivered, both bearing date of execution the 8th November, 1866, and both parties tell you that they know nothing of the existence of the security to the other when the same was given to themselves, and not until some time afterwards. Whatever uncertainties, if any, exist in regard to the dates or in the evidence touching these conflicting claims of plaintiffs and intervenors, is for you to harmonize, taking all the evidence into consideration, & render your verdict accordingly.

As to the question of notice by recording the deeds upon which counsel have argued before you to some length, as though it had an important bearing in the case, I have only to say that neither were recorded before the execution and delivery to the other, and consequently
45 there could be no notice to the other before the taking of the conveyance to themselves.

Gentlemen, you will answer the special interrogatories submitted to you as you find the evidence warrants, and sign them by your foreman in connection with a general verdict between the plaintiffs and intervenors, the defendants setting up no claim in the suit, but leaving the matter to the plaintiffs and intervenors to settle between themselves.

MUNSON, *Judge.*

Exception to charge by both parties before jury retired, and also to instructions refused, asked for, and refused.

MUNSON, *Judge.*

Who, after deliberation, returned the following verdict, to wit:

"I."

46 GRIFFITH & THOMPSON
vs.
HERMAN & STAR, DEF'TS, & L. H. HERSHfield & A. Hanauer, interveners.

Special findings of jury.

PLAINTIFFS' QUESTIONS.

1st. Had the time of plaintiffs' expired for filing a mechanic's lien at the time of taking the mortgage?

Answer. It has not.

JOHN T. MURPHY, *Foreman.*

1½. Did the plaintiffs fail to file a mechanic's lien in consequence of Herman & Star executing to them the mortgage sued on?

Answer. They did.

JOHN T. MURPHY, *Foreman.*

2nd. When did plaintiffs first hear that intervenors had taken
47 a deed or mortgage upon the property mortgaged to them?

Answer. About one month.

JOHN T. MURPHY, *Foreman.*

3. Had the records of plaintiffs been perfected before plaintiffs first received any information or notice of intervenors' deed or mortgage ?
Answer. They had.

JOHN T. MURPHY, *Foreman.*

4. Was the record of plaintiffs or intervenors made first ?
Answer. The record of plaintiffs made first.

JOHN T. MURPHY, *Foreman.*

5th. Was the mortgage or instrument of plaintiffs, or mortgage or instrument of intervenors, made & executed first ?
Answer. Both executed same day.

JOHN T. MURPHY, *Foreman.*

48 6th. Is there any mistake in the date in the body of the instrument or mortgage of plaintiffs ?
Answer. There is a mistake.

JOHN T. MURPHY, *Foreman.*

7th. If, in answer to 6th interrogatory, you find there is a mistake in said date, what is the correct and proper date ?
Answer. Seventeenth day of October, 1866.

JOHN T. MURPHY, *Foreman.*

8th. Question was repeated by order of court.
9th. Is the mortgage of plaintiffs and the record of same sufficient to notify intervenors of what property was mortgaged, the parties to whom it is due, and the amount of the indebtedness ?
Answer. It is.

JOHN T. MURPHY, *Foreman.*

49 10th. Was the mortgage or deed of the intervenors, Hershfield & Hanauer, made to secure future advances, or was it an indemnity to them as endorsers or sureties ?
Answer. Both.

JOHN T. MURPHY, *Foreman.*

11th. What was the value of three hundred and thirty-three ounces six and one-half d'w'ts and four grains of clean bankable gold-dust, on the 8th day of November, A. D. 1866 ?
Answer. Seven thousand five hundred dollars, ($7,500.00,) Treasury notes.

JOHN T. MURPHY, *Foreman.*

DEFENDANTS' QUESTIONS & SPECIAL FINDINGS THEREON.

1st. What was the value, on the 8th day of November, 1866, of 93½ ounces of gold-dust, the amount mentioned in the note and mortgage of plaintiffs ?
50 Answer. Two thousand one hundred and three $\frac{75}{100}$ dollars, Treasury notes, ($2,103.75.)

JOHN T. MURPHY, *Foreman.*

2nd. Which of the instruments, the mortgage of plaintiffs or deed of intervenors, was first executed & acknowledged ?
Answer. Both executed and acknowledged on the same day.

JOHN T. MURPHY, *Foreman.*

3rd. Had the intervenors any notice of the execution of the mortgage to Griffith & Thompson at the time of the execution and delivery of their deed?

Answer. They did not.

JOHN T. MURPHY, *Foreman.*

4th. What is the sum now due, respectively, to said plaintiffs and to the said Hershfield & Hanauer?

51 Answer. Due Hershfield & Hanauer on note, fifteen thousand two hundred and sixty-two & $\frac{50}{100}$ dollars, in Treasury notes; and on check, two thousand dollars; and on bill of merchandise, two hundred and fifty-two & $\frac{28}{100}$ dollars, in Treasury notes.

Due Griffith & Thompson, on note, three thousand nine hundred and ninety-three & $\frac{75}{100}$ dollars, in Treasury notes.

JOHN T. MURPHY, *Foreman.*

5th. How much, if anything, was actually due from Herman & Star to Hershfield & Hanauer, aside from the liability on their endorsement, at the time of the execution of their deed?

Answer. Twenty-five hundred dollars.

JOHN T. MURPHY, *Foreman.*

And at the same time the jury returned the following—

General verdict.

We, the jury in the cause wherein Griffith & Thompson are
52 plaintiffs and Herman & Star defendants, find for the plaintiffs.

JOHN T. MURPHY, *Foreman.*

The plaintiffs then asked that the jury be remanded to find a general verdict between plaintiffs and intervenors; to which the intervenors then objected. The objection was overruled and the jury were remanded; to which overruling of said objection and the remanding the said jury, the said intervenors then and there excepted.

The jury again returned into court and brought in the following verdict, to wit:

"K."

We, the jury in the case of Griffith & Thompson, plaintiffs, and Herman and Star, defendants, and L. H. Hershfield & Co., intervenors, find for the plaintiffs.

JOHN T. MURPHY, *Foreman.*

53 The defendants then asked the court to make and order to be entered the following decree, to wit:

"L."

GRIFFITH & THOMPSON
vs.
HERMAN & STAR, DEF'TS; L. H. HERSHFIELD & A. Hanauer, intervenors.

In 3 judicial district court, Lewis & Clarke County, Montana Territory.

This cause coming on to be heard upon the pleadings, proofs, and exhibits, and the special findings and verdict of the jury heretofore empanneled in this cause, and the court being fully advised in the premises, and having heard the arguments of counsel, it appearing to the court from said proofs, exhibits, and findings of said jury
54 that said defendants, on the 8th day of November, 1866, was indebted to the intervenors in the sum of twenty-five hundred ($2,500.00) dollars; and that, on that day, the said intervenors endorsed a certain note as security for the payment of three hundred and thirty-three ounces six and one-half pennyweights and four grains of clean bankable gold-dust, with interest thereon at the rate of twenty ounces of such bankable gold-dust per month, which said note the said intervenors, as such endorsers, were compelled to pay, and did pay; and that, to secure said intervenors, the said defendants, on said day, executed and delivered to them a deed for the property described in said complaint; which deed was duly acknowledged and recorded in the recorder's office of the county of Jefferson, in said Territory, on the 14th day of November, 1866;

55 And it also appearing to the court, from the findings of said jury, that there was due to said intervenors, from said defendants, on the 16th day of April, 1866, the sum of seventeen thousand five hundred and fourteen dollars and seventy-eight cents, which was intended to be secured by said deed;

And it also appearing to the court, from the proofs, exhibits, and findings of said jury, that the said defendants, on the 17th day of October, A. D. 1866, were indebted to the plaintiffs in ninety-three and one-half ounces of gold-dust, with interest at the rate of four and two-thirds ounces of gold-dust per month, and that on that day they made and executed a promissory note to said plaintiffs for that amount, and a mortgage to secure the payment of the same, on the same premises
56 so deeded to said intervenors, and which mortgage was acknowledged and delivered to said plaintiffs on the said 8th day of November, 1866, and which was filed for record in the recorder's office of Jefferson County aforesaid, on the 10th day of November, A. D. 1866; and it also appearing, from the findings of said jury, that the value of such gold-dust at the time of the execution and delivery of said mortgage was the sum of three thousand nine hundred and ninety-three & $\frac{75}{100}$ ($3,993.75) dollars; and it also appearing to the court that said mortgage of said plaintiffs was not duly stamped with a United States internal revenue stamp of sufficient value, as required by the laws of the United States relating to internal revenue, but had affixed thereto a stamp of the value only of two dollars, and that therefore the said mortgage was improperly and unlawfully placed
57 upon the record by said recorder of Jefferson County, and was prohibited by law from being placed upon record, and was not notice to said intervenors, and that said intervenors are not chargeable with any notice of said mortgage prior to the time their said deed was so recorded, and that their said deed is entitled to priority as an incumbrance and lien upon the property therein and in the said complaint described, viz, one fifteen-stamp quartz-mill, located in Pipestone district, in Jefferson County, and on Pipestone Creek, on the said mortgage of said plaintiffs: It is ordered, adjudged, and decreed that said deed of said intervenors be, and is hereby, declared to be a prior lien, and that it be precedence over the said mortgage of said plaintiffs upon said premises to the extent of the
58 sum secured thereby, viz, seventeen thousand five hundred and

fourteen dollars & seventy-eight cents; and that the said deed be foreclosed, and the premises aforesaid sold for the payment and satisfaction thereof, by the sheriff of Jefferson County, according to law. And it is further ordered that said sheriff proceed to sell said premises in the manner prescribed by law for sales under mortgage foreclosures, and that from the proceeds of such sale the said sheriff first pay the said intervenors the amount of their said debt, principal and interest, & costs, if said property shall sell for enough to satisfy the said sum then due, and if it shall not sell for enough that then said sheriff report the balance yet remaining due and unpaid, and that judgment be then docketed for such balance, according to law; and that the said inter-
59 venors have execution therefor.

It is further ordered that, if said property shall sell for more than sufficient to pay and satisfy the said sum, interest, and costs due said intervenors as aforesaid, that he then pay such surplus to said plaintiffs; and if it shall not be sufficient to pay the amounts so found due to them on said note by said jury, that they have execution for the balance. It is further ordered that the said mortgage of said plaintiffs be, and it is hereby, declared to be inoperative, invalid, and void as to the said intervenors.

The plaintiffs also presented and asked the court to make and sign the following decree, to wit:

And afterwards, to wit, on the 8th day of May, A. D. 1868, the
60 judge signed the said decree, and the same was entered as the judgment in the case, on the said 18th day of May, A. D. 1868, as follows, to wit:

"M."

JOSEPH GRIFFITH AND WILLIAM THOMPSON, partners doing business under the firm-name and style of Griffith and Thompson,
vs.
JOHN HERMANN AND SOLOMON STAR, partners, under the firm-name of Hermann & Star; and Lewis H. Hershfield and A. Hanauer, copartners, under the firm-name of L. H. Hershfield Co., intervenors.

Territorial district court, third judicial district, Lewis & Clarke County, Montana Territory.

61 And now come the said parties, by their attorneys, and thereupon this action came on for trial on the complaint, answers of defendants, and the petition of the intervenors, L. H. Hershfield & Co.; and, also, the evidence which was submitted to a jury, which, after argument of counsel, and receiving instructions from the court, found a verdict for the plaintiffs as against the defendants, and, also, as against the intervenors; and, whereas the jury further found that the mortgage, executed by the defendants to plaintiffs, was recorded before that of the intervenors, and, that plaintiffs had no notice of the mortgage of the intervenors until their own mortgage had been recorded; and that the record of plaintiffs' mortgage was sufficient to notify the intervenors of what property was mortgaged, the parties to whom it was due, and the amount of indebtedness therein se-

62 cured; and as the jury further found that there is now due to the plaintiffs upon the note described in plaintiffs' complaint, and secured by the mortgage (which this action is instituted to forclose) the sum of three thousand nine hundred and ninety-three $\frac{75}{100}$ dollars in Treasury notes:

It is therefore considered by the court that the plaintiffs recover of the said defendants, the said sum of three thousand nine hundred and ninety-three and $\frac{75}{100}$ dollars, together with interest from this date, at the rate of two and one-half per cent. per month, and also his costs, taxed at one hundred and eighteen & $\frac{85}{100}$ dollars.

And it is further ordered and adjudged that the lien of the mortgage of plaintiffs upon the mortgaged premises, being prior to that of the intervenors, the same shall be first satisfied out of the said mortgaged property, and that the said plaintiffs recover the aforesaid

63 amount, interest, and costs out of said mortgaged premises; and, that a special execution issue from this court to the sheriff of Jefferson County, or if any part of said mortgaged property be removed, to the sheriff of the county in which it is situated, commanding said sheriff to levy the same upon the property described in the mortgage to plaintiffs as set forth in their complaint, to wit, one 15 (fifteen) stamp quartz-mill, located in Pipestone district, and on Pipestone Creek, in Jefferson County, Montana Territory, and that the said property be advertised and sold according to law, and apply the proceeds of said sale in satisfaction of the said judgment in favor of plaintiffs; and the remainder, after paying the amount of plaintiffs' said judgment and costs, shall be applied to the payment of the mortgage executed

64 to the intervenors aforesaid, to the extent of the amount found due them by the jury, interest and costs; and the remainder, if any, shall be paid to the defendants, Herman & Star, or their legal representatives; and that the said sheriff report his proceedings in the premises to the next term of this court.

L. E. MUNSON,
Judge District Court.

THIRD JUDICIAL DISTRICT COURT, M. T., *May 18th*, 1868.

The judge held the case under advisement until the 18th day of May, 1868, and in the vacation following the term at which the case was tried, signed and ordered to be entered the decree presented by the plaintiffs, and refused to sign and order to be entered the decree presented by the intervenors. The intervenors excepted to the entry of said decree in favor of the plaintiffs and the refusal of the judge to sign

65 the decree tendered by the intervenors.

Points of appellants.

The court erred in permitting the mortgage given by Herman and Star to plaintiffs to be read in evidence to the jury, and not excluding the same at the several times when objections were raised thereto by intervenors.

The court erred in permitting the certified copy of the mortgage to be read in evidence.

The court erred in not sustaining the objection to the questions asked of the witness Thompson regarding his reasons for not filing a mechanic's lien.

The court erred in permitting questions numbered 1, 2, 3, 4, 5, 6, & 7 to be asked and answered by the witness Thompson.

66 The court erred in not decreeing priority to the lien of the intervenors over the mortgage of plaintiffs.

The court erred in decreeing priority to the lien of plaintiffs over the claims of the intervenors.

The court erred in signing a decree and ordering the entry of any judgment in favor of plaintiffs in this cause affecting in any way the claims of the intervenors.

The judgment entered in favor of the plaintiffs is void.

W'M CHUMASERO,
Att'y for Intervenors.

Statement allowed.

MUNSON, *Judge.*

67 And, afterwards, on the 20th day of May, A. D. 1868, the intervenors, by their attorney, W'm Chumasero, filed with the clerk of said court their notice of appeal in words and figures, of which the following is a copy, to wit:

"F."

District court, 3 judicial dist., Lewis & Clarke County, Montana Territory.

GRIFFITH & THOMPSON
vs.
SOLOMON STAR AND JOHN HERMANN, DEFEND'TS; and L. H. Hershfield and A. Hanauer, intervenors.

Take notice that the above-named intervenors, Lewis H. Hershfield and A. Hanauer, hereby appeal to the supreme court of Montana Territory, from the judgment or decree rendered in this cause, and filed on the 16th day of May, A. D. 1868; that the appeal is taken from the judgment of the court giving priority to the claims of said plaintiffs

68 over the claims of the intervenros, and for not giving such priority to the claim of the said intervenors.

WILLIAM CHUMASERO,
Attorney for Lewis H. Hershfield and A. Hanauer, Intervenors.

HELENA, *May 18th*, 1868.

To Messrs. WOOLFOLK, PEMBERTON & TOOLE,
Plaintiffs' Attorneys.

69 *Certificate.*

District court, 3rd judicial dis't.

TERRITORY OF MONTANA,
Lewis & Clarke County:

I, Cha's W. Fowler, clerk of said court, do hereby certify that the foregoing copies of complaint, marked "A;" answer of defendants, marked "B;" petition of intervenors, marked "C;" plaintiffs' answer to intervenors, marked "D;" plaintiffs' mortgage, marked "E; certified

copy of same, marked "F;" plaintiffs' questions, marked "G;" deed to intervenors, marked "H;" charge of the court to the jury, marked "I;" verdict and special findings, marked "J;" verdict of the jury, marked "K;" def'ts' decree, marked "L;" and plaintiffs' decree, marked "M;" together with the copies of orders, &c., therein, comprise a true, full, and complete transcript on appeal to the supreme court of said Territory, in the case wherein Griffith & Thompson are the plaintiffs, against
70 Herman and Star, defendants, and Hershfield & Hanauer, intervenors.

In testimony whereof I have hereunto set my hand and the seal of said court, affixed this 10th day of November, A. D. 1868.

[SEAL.] CHARLES W. FOWLER, *Clerk.*
By CHA'S G. REYNOLDS,
Deputy-Clerk.

71

72

73 In the supreme court of Montana Territory. December term thereof, A. D. 1868.

JOSEPH GRIFFITH AND WILLIAM THOMPSON, respondents,
vs.
SOLOMON STAR AND JOHN HERMANN, DEFENDants; and Lewis H. Hershfield and A. Hanauer, intervenors, appellants.

Appeal from third judicial district court, Lewis & Clarke County, Montana Territory.

Be it remembered that, on the 30th day of November, A. D. 1868, the transcript on appeal in the above-entitled cause was filed with the clerk of said supreme court, and the cause duly entered for hearing at
74 the ensuing December term of said supreme court.

And afterwards, to wit, on the 7th day of December, A. D. 1868, the appellants in said cause, by their attorney, William Chumasero, esq., filed herein their points and authorities, of which, in words and figures, the following is a copy, to wit:

In supreme court Montana Territory.

GRIFFITH & THOMPSON, PL'FFS,
vs.
HERMAN & STAR, DEF'TS; HERSHFIELD & Hanauer, intervenors.

The appeal is taken from the decree of the court below, giving priority to the claim of the plaintiffs over that of the defendants; on the trial *trial* the plaintiffs introduced and offered in evidence the
75 mortgage, marked in the record "E," which was given to secure the payment of 93½ ounces of gold-dust.

To the introduction of which evidence the intervenors and defendants, by their attorney, objected, on the ground that the same was not sufficiently stamped, the complaint showing and alleging upon its face that the gold-dust therein mentioned was of the value of $2,770.60.

The law of Congress regulating and imposing stamp duties, requiring

that the amount of stamps affixed to a mortgage should be based upon the amount it is given to secure. (See Laws & Regulations, series 3, No. 10, May 10, 1867, page 12.)

This mortgage has upon it a stamp of only $2.00, one dollar less than required by law, and as shown upon the face of the complaint itself.

This mortgage, it will be seen, was executed and delivered on
76 the 8th day of November, to secure a note previously and on 17th day of October, given by Herman & Star to the plaintiffs; and the testimony of the witness Thompson show' that the mortgage, although bearing 17th October, on the same day the note was executed, was in reality not made until the day before its execution.

At the time of the giving of the note itself, it was not sufficiently stamped, and could have been defeated by the defendants for that reason.

If it shall be said that the stamps upon the two instruments, taken together, were sufficient under the provision of the statute allowing the stamp to be affixed to either of them, we answer—

1st. That the provision would not authorize the stamps to be divided. One of the instruments must be sufficiently stamped.

77 2nd. That even if the stamps were allowed to be divided and placed upon both instruments, it could only be allowed where the instruments were executed simultaneously. The law makes provision for stamping instruments insufficiently stamped by application to the collector, (see sec. 158, Internal Revenue Laws, 1867;) and provides that no rights acquired in good faith prior to such stamping shall be affected thereby.

The parties could not by their own voluntary subsequent act affect such rights, (see answer of jury to 7th question of pl'ffs,) and consequently the mortgage so executed 22 days after the note it was given to secure, ought to have had upon it the full amount which was required by law at the time of its execution, and could not be so connected with the previous instrument as to avoid any of the consequences following an insufficient stamping of either.

78 A stamp once cancelled cannot be used to give validity to an instrument subsequently executed.

It may be said that the amount secured was uncertain. Perhaps there might be force in this view of the case, were it not shown that the parties to the instruments were at the time well aware of what the amount intended to be secured by it was. And that they did so know is completely and perfectly evidenced by reference to the complaint, which alleges the value to be $2,770.60; and, by the evidence of William Thompson, one of the plaintiffs, who testified "that, at the time of the settlement and execution of the note and mortgage, the plaintiffs estimated gold-dust at twenty-two dollars per ounce in currency."

Mr. Hanauer testified that it was worth from $22.50 to $24.00
79 per ounce; and the jury to whom the question was referred found the value to be $2,103.75.

(See answer 1, defendants' questions.)

So that there can be no question that the plaintiffs at the time of the execution of the instruments, knew that the amount intended to be secured was over $2,000, and that the value never decreased, but that the evidence shows that such was the fact, and the finding of the jury is conclusive on that subject.

These being the facts, as shown by the record, was the mortgage entitled to be recorded; and if recorded, was such record any notice to subsequent purchasers or incumbrancers of the property? I say not, because—

1st. The full amount required should have been placed upon the instrument required to have been recorded, or at least it should satisfactorily show that the proper amount had been affixed to some instrument.

80 2nd. The law (see sec. 152 & 163) enacts that it shall not be lawful to record any instrument, document, or paper required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed and cancelled in the manner required by law, and that otherwise the record shall be absolutely void and not used in evidence.

In connection with the above section, I refer to sec. 158, which provides that, if subsequently sufficiently stamped, such subsequent stamping should not interfere with rights acquired prior thereto.

For these reasons I argue and submit to the court, that the judges of the court below erred in permitting the plaintiffs' mortgage to be used in evidence to the jury, and in not excluding the same from consideration in the case.

81 I do not enter into the consideration of the evidence on the part of the intervenors. The jury find that there was due them at the date of the trial $17,514.78. Both parties immediately asked for decrees. The trial and verdict was on 15th day of April, 1868; but the court, notwithstanding the decrees were immediately presented to him for his adjudication on the verdict and evidence, retained the same until after the close of the term, and in the vacation following signed, on the 18th day of May, long after said adjournment, a decree in favor of the plaintiffs, giving them priority over the defendants for the amount of their claim, with interest, and interest on the amount of the decree at the rate of two and one-half per cent. per month.

The main question presented to the court for their decision is not one of fraud on the part of the plaintiffs against the United States in

82 not placing sufficient stamps upon their note and mortgage. It is unnecessary to charge this upon them, and I have not any desire to do so.

But I insist that the fact that such mortgage was not sufficiently stamped is one which, so far as constructive notice of its execution and record is in question, renders it entirely inoperative so far as the mortgage of the intervenors is affected thereby. The recorder had no right in the first place to place it on record. It had no business there. It was not entitled to record; and the rule of law is too well settled to need the production of any authority that no instrument placed on record, even with*out* authority of law, can be treated as notice to subsequent purchasers or incumbrancers.

In this case it was not only not entitled to place on the record,

83 but the record was absolutely forbidden by law, as I have shown by the sections of the revenue law heretofore cited.

I contend further that the court erred in allowing interest upon the amount of the judgment at the rate of two and one-half per cent. per month.

There is no law of Montana Territory authorizing, even when parties contract for it, a greater rate of interest than ten per cent. per annum; but, on the contrary, the law (see Statutes M. T., page 535, sec. 2) expressly fixes the rate of interest on judgments at ten per cent. per annum.

A judgment carries such rate of interest as is legal at the date of the judgment, whatever rate was recoverable on the contract (whether by contract or statute) on which the judgment was rendered.

(6 Halsted, 91; Verrel vs. Hughes; Byrd vs. Gasquet, 1 Hemp,
84 261; Evans vs. White, Id., 396.)

Where a party voluntarily merges his demand into one of a higher character, the original demand is extinguished, and the new security is controlled in all its features by the statute applicable thereto.

I also contend that this decree of Judge Munson's is void. It ought to have been made during the term at which the trial was had, and could only then be entered; a verdict had been rendered and should have been acted on before the close of the term.

If the judge had a right to take the case under advisement, and hold it under consideration until after the close of the term, he could not order the judgment to be entered thereon in vacation.

85 An interlocutory or final judgment cannot be entered in vacation, unless on a cognovit actionen.

(Hogeboom vs. Genet, 6 Johns., 325.)

A judgment entered up in vacation is a nullity.

(Sheppard vs. Wilson, 1 Morris, 448.)

The rendering of a judgment is a judicial act, and must be done by the court.

(Goddard vs. Coffin, Davies, 381.)

It is error to receive a verdict and render judgment after the term has expired by law.

In this case the judgment was not rendered even during the term. Even if the court should be of the opinion that it might be entered in vacation, it must be rendered during a term; but this judgment was neither rendered or entered until after the term had expired, and during the vacation following. Nor was there even any order of the
86 court, after the trial, reserving the cause for further consideration, the laws of Montana, (civil-practice act, sec. 178,) requiring such order, and that the clerk should make an entry. Nothing of this kind was done, the last entry on the record being the record of the clerk, made subsequently to the signing of the decree, merely showing that the court had taken and held the case under advisement.

W'M CHUMASERO,
Att'y for Intervenors.

And, afterwards, to wit, on the 9th day of December, A. D. 1868, the said respondents, Griffith & Thompson, by their attorneys, Word & Spratt and Woolfolk & Toole, filed herein their brief and authorities, of which, in words and figures, the following is a copy, to wit:

87 In the supreme court of Montana Territory.

GRIFFITH & THOMPSON, PLAINTIFFS,
vs.
HERMANN & STAR, DEF'TS; & L. H. Hershfield & Co., intervenors. } Appeal from 3rd jud. dist.

The finding of the jury in this cause show' that the mortgage of plaintiffs was first recorded in the proper county, and it therefore is entitled to precedence over that of the intervenors, L. H. Hershfield & Co.

(Montana Statutes, page 484, sec's 24 & 25;
Also 4th Kent, marginal, " 168, top page 191;
" 4 Abbott, N. Y. Digest, page 688, sec. 75;
" " " " " " 687, " 23.)

This is especially the case, as the jury further found that each mortgage was executed and received without notice of the existence of the other.

88 2nd. The mortgage of the intervenors was executed and recorded as an absolute deed, and does not operate as constructive notice of a mortgage, but is regarded as an unrecorded mortgage.

(4th Abbott, Digest, page 680, sec. 31, 32, 33;
" " " " 686, " 1;
2 Cowan, Reports, " 246–7;
2 Johnson's " " 190, 191.

3rd. As to the objection of insufficient stamp, plaintiffs' mortgage was made and executed to secure a certain amount of gold-dust. The revenue-laws only apply to mortgages securing a certain sum of money, while this mortgage was to secure an uncertain and indefinite amount of gold-dust as to value. (See revenue laws.)

Besides, the note and mortgage were both stamped, and in law
89 are regarded as one instrument. The stamps, amounting to three ($3.00) dollars, was more than sufficient to cover the value of the gold-dust as found by the jury. (See revenue-laws, and decision Commissioner Rollins.)

4th. As to the decree being rendered in vacation, the record is the best and only evidence of what should be proved by its contents; and the record shows no adjournment of the term at which the decree was rendered.

(1st Greenleaf, section 513.
31st California Reports, 446–448.)

Even if the decree had been signed in vacation, the finding of the jury was in court and during the term, and it becomes the duty of the supreme court to enter such judgment on the finding as is right.

(See 31st Cal. Reports, page 488.)

90 WORD & SPRATT,
WOOLFOLK & TOOLE,
Att'ys for Respondents.

And, afterwards, to wit, on the 31st day of December, A. D. 1868, (the said appeal having been argued by counsel and submitted,) the court rendered judgment on the appeal as follows, to wit:

" It is ordered and adjudged that the judgment entered in this cause in the court below be modified so as to bear interest at the rate of ten per cent. per annum instead of two and one-half per cent. per month, and that the same be affirmed as modified."

And thereupon the court filed a written opinion herein, of which, in words and figures, the following is a copy, to wit:

91 JOSEPH GRIFFITH AND WILLIAM THOMPSON, partners, &c., respondents,
vs.
L. H. HERSHFIELD AND A. HANAUER, PARTNERS, &c., appellants.
} Appeal from Lewis & Clarke County.

In the supreme court of the Territory of Montana. December term thereof, A. D. 1868.

Opinion of the court by Warren, C. J.; Knowles, A. J., concurring.

The chief question raised upon this record is the sufficiency of the revenue stamps affixed to the instruments executed to appellees by

Hermann and Star, defendants below. The internal-revenue act in force at the time they were executed imposed an ad valorem duty
92 upon specified instruments in writing for payment of money or upon "other written or printed evidence of an amount of money to be paid on demand or at a time designated;" and also upon mortgages of real or personal property made as security for the payment of any "definite and certain sum of money." It also provides that it shall not be lawful to record any instrument required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed, and that such record, if made, shall be void, and shall not be used in evidence.

The instrument in question in this case is not for the payment of money.

It is "evidence" of an agreement to pay appellees a certain number of ounces of gold-dust, on demand, and the mortgage was executed to secure the same. The former instrument was stamped to the amount
93 of one dollar and the latter to the amount of two dollars.

The appellants contend that they were insufficiently stamped, and that the record of the mortgage, though made prior to that of the conveyance or mortgage to them, was void, and that they were not thereby legally charged with notice of its existence. It is assigned that the court erred in admitting the instruments and the certificate of record of the mortgage in evidence upon the trial below.

We are of opinion that the instruments in question are not embraced in the schedule embodied in the revenue act as subject to the ad valorem duties thereby imposed upon similar instruments for the payment and securing of money, and that they were valid, and that proof of the record of the mortgage was properly admitted.

The contract or agreement of the parties was for the payment
94 or delivery of certain property, and the mortgage was executed to secure the performance of the agreement, and they cannot be regarded as being for the payment of money. Had the money-value of the gold-dust been expressed in the instrument, or could it have been ascertained from its terms, the case would have been different.

It was the duty of the recorder, under the territorial law, to record the mortgage, and the record when made was notice to all. Under the act of Congress he had no legal authority to determine the value of the property embraced in the mortgage, and the payment of which it was made to secure; and no means were furnished him by which to arrive at the amount of duty to which the instrument was subject. Had Congress designed to include such instruments in the provision re-
95 lating to recording, power would have been conferred to ascertain by some means the value, in order to determine whether the amount of ad valorem duty paid, as denoted by the stamps, entitled it to record or not.

Admitting, however, that, while the instrument secured by the mortgage was only subject to duty as an agreement or contract, the mortgage was subject to the ad valorem duty, the amount to which it was subject would depend upon the value of the property secured by it at the time of the execution of the mortgage, and not upon its subsequent value, or with the accrued interest.

The agreement or memorandum and the mortgage both bear date October 17th, 1866, and, in their special finding, the jury found that to be the true date. There is no proof and no presumption of law
96 that the value of the gold-dust at that time exceeded the amount of indicated by the stamps.

If, however, as claimed by appellants, the mortgage was not executed until November 8th, 1866, still, the value of the gold at the time, as found by the jury, was $2,103.75, and the two instruments constituting but one transaction, the amount of duty upon them denoted by the stamps was sufficient.

The object of the act is to derive revenue, and the amount of the stamps being sufficient, it is not material to which they were affixed.

The record shows that, after rendition of the verdict, the court, on appellant's motion, ordered the case to be reserved for further consideration; and, after argument, entered judgment in conformity to the verdict.

In this there was no error.

The court below erred in allowing interest upon the judgment
97 at a greater rate than ten per cent. per annum, and the judgment is hereby modified so as to conform to this opinion, and affirmed as modified.

And, afterwards, to wit, on the 10th day of February, A. D. 1872, the said intervenors, Lewis H. Hershfield and A. Hanauer, filed herein their petition, and an order granting an appeal from the judgment entered in said cause in the supreme court of Montana Territory to the Supreme Court of the United States; of which petition and appeal the following is a copy, to wit:

"JOSEPH GRIFFITH AND WILLIAM THOMPSON, under the name, firm, and style of Griffith
98 & Thompson,

vs.

SOLOMON STAR AND JOHN HERMANN, DEFENDants; and Lewis H. Hershfield and Abraham Hanauer, intervenors.

To the honorable the Supreme Court of the United States:

The appeal of Lewis H. Hershfield and Abraham Hanauer, above-named intervenors, appellants, respectfully showeth:

That, on the 18th day of June, A. D. 1867, the above-named complainants filed their bill in the third judicial district court in and for Lewis and Clark County, Montana Territory, against the defendants, Solomon Star and John Hermann, praying for the foreclosure of a certain mortgage executed by them to said complainants on certain property therein described, in which action the said Lewis H. Hersh-
99 field and Abraham Hanauer intervened, under the statutes of Montana Territory, claiming priority as mortgagees, under and by virtue of a certain mortgage executed by said Star and Hermann to them upon the same property. The cause was tried before a jury empanneled by the court, on the 16th day of May, 1868, who returned a verdict in said cause; and the said court thereupon, basing its decision upon such verdict, on the 18th day of May, 1868, rendered a personal judgment against the defendants, Star and Hermann, for the sum of three thousand nine hundred and ninety-three dollars and seventy-five cents, with interest from the date of *of* said judgment, at the rate of two and one-half per cent. per month, besides costs, and decreeing priority to said complainants over the mortgage of said Hershfield & Hanauer, which judgment and decree were final. From which decree the said Lewis
100 H. Hershfield and Abraham Hanauer appealed to the supreme court of the Territory of Montana; and, on the hearing of said appeal in said supreme court of the Territory of Montana, the said

judgment & decree was, by said supreme court, on the 31st day of December, A. D. 1868, affirmed, except as to the rate of interest after the date of the said judgment and decree, rendered in said third judicial district of said Lewis & Clarke County, Montana Territory.

Wherefore these appellants appeal from the whole of said decree of the said supreme court of the Territory of Montana, and respectfully pray that the decree so made and entered in said third judicial district court of Montana Territory, and the order and judgment of the said supreme court of the Territory of Montana, and the bill, answer,
101 petition of said appellants L. H. Hershfield and A. Hanauer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew; and that the said decree of the said supreme court, affirming the decree and judgment of said district court of the said third judicial district of Montana Territory, and every part thereof, may be reversed, and a decree made dismissing said bill with costs, or such other decree as to the said Supreme Court shall seem just.

Dated at Helena, M. T., January 30th, 1872.

CHUMASERO & CHADWICK,
Sol's for Appellant.
W. F. CHADWICK, *of Counsel.*

102 Appeal allowed by the undersigned and amount of bond to be entered into by appellants with security is hereby fixed at the sum of $500.00.

D. S. WADE,
Chief Justice of the Supreme Court of Montana Territory.
JOHN L. MURPHY,
Associate Justice Sup. Court, M. T.

Filed Feb'y 10th, 1872.

I. R. ALDEN, *Clerk.*

And on the same day the said intervenors and appellants filed herein their undertaking on appeal, of which, in words and figures, the following is a copy, to wit:

Supreme Court of the United States.

103 Know all men by these presents that we, Lewis H. Hershfield, A. Hanauer, and N. N. Sensenderfer & E. W. Carpenter, of Helena, Lewis and Clarke County, Montana Territory, are held and firmly bound unto Joseph Griffith and William Thompson, in the sum of five hundred dollars, to be paid to the said Griffith and Thompson, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 30th day of January, 1872.

Whereas the above-named Lewis H. Hershfield and Abraham Hanauer have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the supreme court of the Territory of Montana:

Now, therefore, the condition of this obligation is such, that if
104 the above-named Lewis H. Hershfield and Abraham Hanauer shall prosecute their said appeal with effect, and answer all costs

if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

LEWIS H. HERSHFIELD.
A. HANAUER.
E. W. CARPENTER.
N. N. SENSENDERFER.

Sealed & delivered in presence of—

I hereby approve of the foregoing bond.

D. S. WADE,
Chief Justice of the Supreme Court of M. T.
JOHN L. MURPHY,
Associate Justice Sup. C't, M. T.

Filed Feb'y 10, 1872.

I. R. ALDEN, *Clerk.*

105 And, afterwards, to wit, on the 18th day of March, A. D. 1872, the said appellants filed herein their citation, of which, in words and figures, the following is a copy, to wit:

United States of America to Joseph Griffith and William Thompson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December, 1872, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Montana, wherein Lewis H. Hershfield and Abraham Hanauer are appellants, and you are appellees, to show cause, if any there be, why the decree in said appeal men-
106 tioned should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the honorable D. S. Wade, chief justice of the said supreme court of the Territory of Montana, this 28th day of February, A. D. 1872.

D. S. WADE,
Chief Justice, M. T.

I hereby certify that I served the foregoing citation upon William Thompson, at Virginia City, Montana, at 9½ a. m., of March 18th, 1872, by reading the same to him and serving a true copy thereof upon him. And I further certify that I served the said citation upon Joseph Griffith, by leaving a true copy thereof at the last known place of residence of said Joseph Griffith, situate about 7 miles north of Virginia City, Montana.

Fees: mileage, 7.50; 2 services, 4.00; 2 copies, 20—$11.70.

V'a City, M. T., M'ch 28, 1872.

W. F. WHEELER,
U. S. Marshal.
By F. C. DEIMLING, *Deputy.*

107 In the supreme court of Montana Territory.

JOSEPH GRIFFITH AND WILLIAM THOMPSON
vs.
SOLOMON STAR AND JOHN HERMAN, DEF'TS; and Lewis H. Hershfield and Abraham Hanauer, intervenors.

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify the foregoing 106 pages, numbered from one to one hundred and six, to contain a full, true, and correct transcript of the proceedings had and done in the above-entitled cause, in the third judicial district court, and in the supreme court of the Territory of Montana, as the same appears of record and on file in my office.

108 In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Virginia City, in said Territory, this 15th day of May, A. D. 1872.

[SEAL.] I. R. ALDEN, *Clerk.*

109 JOSEPH GRIFFITH & WILLIAM THOMPSON, partners, under the name, firm, & style of Griffith & Thompson,
vs.
SOLOMON STARR & JOHN HERMAN, DEFENDANTS; and Lewis H. Hershfield & Abraham Hanauer, intervenors.

To the honorable the Supreme Court of the United States:

The appeal of Lewis H. Hershfield & Abraham Hanauer, above-named interveners, appellants, respectively sheweth that, on the 18 day of June, A. D. 1867, the above-named complainants filed their bill in the third judicial district court, in and for Lewis and Clark County, Montana Territory, against the defendants, Solomon Starr and John Herman, praying for the foreclosure of a certain mortgage executed by them to said complainants, on certain property therein described, in which action the said Lewis H. Hershfield and Abraham Hanauer intervened, under the statutes of Montana Territory, claiming priority as mortgagees, under and by virtue of a certain mortgage executed by said Starr & Herman to them upon the same property. The cause

110 was tried before a jury empannelled by the court on the 16th day of May, 1868, who returned a verdict in said cause; and the said court thereupon, basing its decision upon such verdict, on the 18th day of May, 1868, rendered a personal judgment against the defendants, Starr & Herman, for the sum of three thousand nine hundred and ninety-three dollars and seventy-five cents, with interest, from the date of said judgment, at the rate of two and one-half per cent. per month, besides costs, and decreeing priority to said complainants over the mortgage of said Hershfield & Hanauer, which judgment and decree were final.

From which decree the said Lewis H. Hershfield and Abraham Hanauer appealed to the supreme court of the Territory of Montana; and, on the hearing of said appeal in said supreme court of the Territory of Montana, the said judgment decree was, by said supreme court, on the 31st day of December, A. D. 1868, affirmed, except as to the rate of interest after the date of the said judgment and decree rendered in said third judicial district of said Lewis and Clark County, Montana Territory.

111 Wherefore these appellants appeal from the whole of said decree of the said supreme court of the Territory of Montana, and respectfully pray that the decree so made and entered in said third judicial district court of Montana Territory, and the order and judgment of the said supreme court of the Territory of Montana, and the bill, answer, petition of said appellants .L. H. Hershfield and A. Hanauer, pleadings, depositions, evidence, and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew; and that the said decree of the said supreme court affirming the decree and judgment of said district court of the said third judicial district of Montana Territory, and every part thereof, may be reversed and a decree made dismissing said bill with costs; or such other decree as to the said Supreme Court shall seem just.

Dated at Helena, M. T., January 30th, 1872.

CHUMASERO & CHADWICK,
Sol'rs for Appellant.
W. F. CHADWICK, *Of Counsel.*

112 Appeal allowed by the undersigned; and amount of bond to be entered into by appellants, with security, is hereby fixed at the sum of $500.00.

D. S. WADE,
Chief Justice of the Supreme Court of Montana Territory.
JOHN L. MURPHY,
Associate Justice Sup. Court, M. T.

(Indorsed:) J. Griffith et al., appellees, vs. L. H. Hershfield et al., appellants. Petition & appeal. Filed Feb'y 10, '72. I. R. Alden, clerk.

113 United States of America to Joseph Griffith and William Thompson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December, 1872, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Montana, wherein Lewis H. Hershfield & Abraham Hanauer are appellants, and you are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the honorable D. S. Wade, chief justice of the said supreme court of the Territory of Montana, this 28th day of February, A. D. 1872.

D. S. WADE,
Chief Justice M. T.

114 I hereby certify that I served the foregoing citation upon William Thompson, at Virginia City, Montana, at 9½ a. m., of March 18, 1872, by reading same to him and serving a true thereof upon him. And I further certify that I served the said citation upon Joseph Griffith, by leaving a true copy thereof at the last known place of residence of said Joseph Griffith, situate about 7 miles north of Virginia City, Montana.

Virginia City, Montana, March 28, 1872.

WM F. WHEELER,
U. S. Marshal,
By F. C. DEIMLING, *Deputy.*

Fees: Mileage, Helena to Virginia City, 125 miles, at 6c., 7.50; 2 services at $2.00, $4.00; 2 copies, 200 words, 20—$11.70.

(Indorsed:) Griffith & Thompson, appellees, vs. L. H. Hershfield et al., appellants. Citation. Filed March 18th, 1872. I. R. Alden, clerk.

(Indorsement on cover:) No. 424. Lewis H. Hershfield and Abraham Hanauer, appellants, vs. Joseph Griffith and William Thompson. Montana Terr'y sup. court. Filed 24th September, 1872.

No. 208.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1873.

LEWIS H. HERSHFIELD, AND ABRAHAM HANAUER, } Appellants.

VS.

JOSEPH GRIFFITH, AND WILLIAM THOMPSON, } Appellees.

BRIEF OF

LYMAN TRUMBULL,

Of Counsel for Appellants.

Rand, McNally & Co., Printers and Engravers, Chicago.

LEWIS H. HERSHFIELD, AND ABRAHAM HANAUER, } *Appellants.*

vs.

JOSEPH GRIFFITH, AND WILLIAM THOMPSON, } *Appellees.*

This was an action commenced by Griffith & Thompson, in the Third Judicial District Court of Montana Territory, against Solomon Starr, and John Herman, to foreclose a mortgage, executed Nov. 8, 1866, by Starr & Herman to said Griffith & Thompson, to secure the payment of the following instrument, described in the complaint as a writing or promissory note in writing, to wit:

"VIRGINIA CITY, Montana Territory, October 17th, 1866."

"Due Griffith & Thompson, or order, for balance due for building quartz mill, as per settlement this date, the amount of ninety-three and one-half ounces (93½ oz.) in good merchantable gold dust, and the amount of four and two-thirds ounces, (4⅔ oz.) per month additional, in merchantable gold dust, from date until paid."

"HERMAN & STARR."

The property to secure this instrument is described in the complaint as "One certain fifteen (15) stamp quartz mill, located in Pipestone District, on Pipestone Creek, in Jefferson County, Montana."

The complaint alleged the value of the gold dust due on the note to be $2,770.60, for which sum with interest as specified in the note and mortgage, judgment was demanded, and a decree prayed that the equity of redemption of the defendants in and to said quartz mill, with the privileges and appurtenances thereto belonging, might be forever barred and foreclosed.

The defendant Starr filed an answer, denying all the allegations of the complaint. Herman failed to answer. Subsequently Hershfield and Hanauer, appellants in this Court, filed their petition to intervene, in which they stated that the said defendants, Starr & Herman, were indebted to them, Nov. 8, 1866, in not less than $5,000, and that for the accommodation of the said defendants, they had endorsed and became liable to pay a certain note, executed by said defendants to one Ryan for 333 ounces 6½ pennyweights and four grains of clean, bankable gold dust, which was of the value of $8,000; that to secure said indebtedness and indemnify the petitioners (appellants), the defendants, Nov. 8, 1866, executed and delivered to them a deed of the property described in said complaint; that afterwards, Feb. 8, 1867, they were compelled, as such endorsers, to pay, and did pay said note, amounting to $9,440, and that in January, 1867, the petitioners made further advances to said Starr & Herman, who at the time of filing said petition were indebted to them in the sum of $16,940, with interest at the rate of six per centum per month, from the respective dates of said indebtedness, over and above all just credits, and that the only security they had for said indebtedness was the property described in the deed to them; that they

had no notice, actual or constructive, of the instrument called a mortgage in said complaint, which they allege to be void as against them, and praying that they might be made parties to said suit, and be permitted to come in and contest the claim of the plaintiffs, and that on a final hearing, they may be declared to be the prior encumbrancers of the said premises to the extent of their demand against the said Starr & Herman, and the premises be decreed to be sold, and from the proceeds the petitioners may be first paid the amount due to them with their costs and charges, etc.

The complainants filed an answer to the petition of the interveners, denying the allegations of their petition. The case was submitted for trial to a jury, under a charge from the court, concluding as follows:

"You will answer the special interrogatories submitted to you as you find the evidence warrants, and sign them by your foreman, in connection with a general verdict between the plaintiffs and the interveners, the defendants setting up no claim in the suit, but leaving the matter to the plaintiffs and interveners to settle between themselves." Record, 45.

The following is the verdict of the jury :

"GRIFFITH & THOMPSON
vs.
HERMAN & STAR, DEF'TS, & L. H. HERSHFIELD & A. HANAUER, interveners.

Special Findings of the Jury.

PLAINTIFFS' QUESTIONS.

1st. Had the time of plaintiffs expired for filing a mechanic's lien at the time of taking the mortgage?

Answer. It has not.

John T. Murphy, Foreman.

1½. Did the plaintiffs fail to file a mechanic's lien in consequence of Herman & Star executing to them the mortgage sued on?

Answer. They did.

John T. Murphy, Foreman.

2nd. When did plaintiffs first hear that intervenors had taken a deed or mortgage upon the property mortgaged to them?

Answer. About one month.

John T. Murphy, Foreman.

3d. Had the records of plaintiffs been perfected before plaintiffs first received any information or notice of intervenors' deed or mortgage?

Answer. They had.

John T. Murphy, Foreman.

4th. Was the record of plaintiffs or interveners made first?

Answer. The record of plaintiffs made first.

John T. Murphy, Foreman.

5th. Was the the mortgage or instrument of plaintiffs, or mortgage or instrument of intervenors, made and executed first?

Answer. Both executed same day.

John T. Murphy, Foreman.

6th. Is there any mistake in the date in the body of the instrument or mortgage of plaintiffs?

Answer. There is a mistake.

John T. Murphy, Foreman.

7th. If, in answer to 6th interrogatory, you find there is a mistake in said date, what is the correct and proper date?

Answer. Seventeenth day of October, 1866.

John T. Murphy, Foreman.

8th. Question was repeated by order of court.

9th. Is the mortgage of plaintiffs and the record of same sufficient to notify intervenors of what property was mortgaged, the parties to whom it is due, and the amount of the indebtedness?

Answer. It is.

John T. Murphy, Foreman.

10th. Was the mortgage or deed of the intervenors, Hershfield & Hanauer, made to secure future advances,

or was it an indemnity to them as endorsers or sureties?

Answer. Both.

John T. Murphy, Foreman.

11th. What was the value of three hundred and thirty-three ounces six and one-half d'w'ts and four grains of clean bankable gold-dust, on the 8th day of November, A. D. 1866?

Answer. Seven thousand five hundred dollars, ($7,500.00,) Treasury notes.

John T. Murphy, Foreman.

DEFENDANTS' QUESTIONS AND SPECIAL FINDINGS THEREON.

1st. What was the value, on the 8th day of November, 1866, of 93½ ounces of gold-dust, the amount mentioned in the note and mortgage of plaintiffs?

Answer. Two thousand one hundred and three $\frac{75}{100}$ dollars, Treasury notes, ($2,103.75.)

John T. Murphy, Foreman.

2nd. Which of the instruments, the mortgage of plaintiffs or deed of intervenors, was first executed and acknowledged?

Answer. Both executed and acknowledged on the same day.

John T. Murphy, Foreman.

3rd. Had the intervenors any notice of the execution of the mortgage to Griffith & Thompson, at the time of the execution and delivery of their deed?

Answer. They did not.

John T. Murphy, Foreman.

4th. What is the sum now due, respectively, to said plaintiffs, and to the said Hershfield and Hanauer?

Answer. Due Hershfield and Hanauer on note, fifteen thousand two hundred and sixty-two and $\frac{50}{100}$ dollars, in Treasury notes; and on check, two thousand dollars; and on bill of merchandise, two hundred and fifty-two dollars in Treasury notes.

Due Griffith & Thompson, on note, three thousand nine hundred and ninety three and $\frac{75}{100}$ dollars in Treasury notes.

John T. Murphy, Foreman.

5th. How much, if anything, was actually due from Herman & Starr to Hershfield and Hanauer, aside from the liability on their endorsement, at the time of the execution of their deed?

Answer. Twenty-five hundred dollars.

John T. Murphy, Foreman."

GENERAL VERDICT.

"We, the jury, in the cause wherein Griffith & Thompson are plaintiffs, and Herman & Starr, defendants, find for the plaintiffs.

JOHN T. MURPHY, Foreman."

The plaintiffs then asked that the jury be remanded to find a general verdict between plaintiffs and interveners; to which the interveners then objected. The objection was overruled and the jury were remanded; to which overruling of said objection, and the remanding the said jury, the said interveners then and there excepted.

The jury again returned into court, and brought in the following verdict, to wit:

"We, the jury, in the case of Griffith & Thompson, plaintiffs, and Herman & Starr, defendants, and L. H. Hershfield & Co., interveners, find for the plaintiffs.

JOHN T. MURPHY, Foreman."

Record 47, 48, 49, 50, 51 and 52.

On the foregoing findings of the jury, the court at a subsequent day entered the following decree, to wit:

"And now come the said parties, by their attorneys, and thereupon this action came on for trial on the complaint, answers of defendants, and the petition of the intervenors, L. H. Hershfield & Co.; and, also, the evidence which was submitted to a jury, which, after argument of counsel, and receiving instructions from the court, found a verdict for the plaintiffs as against the defendants, and, also, as against the intervenors; and, whereas the jury further found that the mortgage, executed by the defendants to plaintiffs, was recorded before that of the intervenors, and, that plaintiffs had no notice of the mortgage of the intervenors until their own mortgage had been recorded; and that the record of plaintiffs' mortgage was sufficient to notify the intervenors of what property was mortgaged, the parties to whom it was due, and the amount of indebtedness therein secured; and as the jury further found that there is now due to the plaintiffs upon the note described in plaintiffs' complaint, and secured by the mortgage (which this action is instituted to forclose) the sum of three thousand nine hundred and ninety-three $\frac{75}{100}$ dollars in Treasury notes:

"It is therefore considered by the court that the plaintiffs recover of the said defendants, the said sum of three thousand nine hundred and ninety-three and $\frac{55}{100}$ dollars, together with interest from this date, at the rate of two and one-half per cent. per month, and also his costs, taxed at one hundred and eighteen and $\frac{85}{100}$ dollars.

"And it is further ordered and adjudged that the lien of the mortgage of plaintiffs upon the mortgaged premises, being prior to that of the intervenors, the same shall be first satisfied out of the said mortgaged property, and that the said plaintiffs recover the aforesaid amount, interest, and costs, out of said mortgaged premises; and that a special execution issue from this court to the sheriff of Jefferson County, or if any part of said mortgaged property be removed, to the sheriff of the county in which it is situated, commanding said sheriff to levy the same upon the property described in the mortgage to plaintiffs as set forth in their complaint, to wit, one 15 (fifteen) stamp quartz mill, located in Pipestone district, and on Pipestone Creek, in Jefferson County, Montana Territory, and that the said property be advertised and sold according to law, and apply the proceeds of said sale in satisfaction of the said judgment in favor of plaintiffs; and the remainder, after paying the amount of plaintiffs' said judgment and costs, shall be applied to the payment of the mortgage executed to the intervenors aforesaid, to the extent of the amount found due them by the jury, interest and costs; and the remainder, if any, shall be paid to the defendants, Herman & Star, or their legal representatives; and that the said sheriff report his proceedings in the premises to the next term of this court."

Hershfield and Hanauer appealed from the decree of the District to the Supreme Court of Montana, where the decree was affirmed, and they now bring the case to this court, and assign for error:

First. The submission of the special interrogatories and the cause, the subject matter whereof was one of equitable jurisdiction, to a jury for trial.

Second. The entry of said decree on the findings of said jury, and not as the result of the Chancellor's own judgment.

Third. The blending of common law and equity proceedings in the trial and conduct of said cause.

Fourth. The remanding of the jury with instructions to find a general verdict between the plaintiffs and the interveners.

Fifth. The entry of said decree in favor of appellees, by which their claim was preferred to appellants.

POINTS.

The case involved the foreclosure of mortgages, the equity of redemption of defendants, the settling of the priorities of conflicting mortgagees, and an equitable disposition of the mortgaged property, which were clearly subjects of equitable jurisdiction.

By Section 13, of the Organic Act establishing the Territory of Montana, it is declared, "That the Constitution and all laws of the United States not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere within the United States." 13 Statutes at Large, 91.

Sec. 9, of the same Act, confers "Chancery as well as common law jurisdiction" upon the Supreme and District Courts of the Territory; and Section 6 inhibits the Territorial Legislature from passing any law inconsistent with the provisions of the Organic Act.

Under these provisions of the Organic Act, it was not competent for the Territorial Legislature to abolish the distinction between chancery and common law proceedings, which the Organic Act had recognized.

The distinction between actions at law and suits in equity cannot be obliterated in the Federal Courts. *Bennett* v. *Butterworth*, 11 Howard, 669; *Robinson* v. *Campbell*, 3 Wheaton, 212; *Noonan* v. *Lee*, 2 Black, 500; *Thompson* v. *Railroad Companies*, 6 Wallace, 135.

The very questions involved in this case, are believed to have been settled by this court in the case of *Dunphy* v. *Kleinsmith*, 11 Wallace, 610.

LYMAN TRUMBULL,

Of Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1873.

HERSHFIELD *et al.*, Appellants,
vs.
GRIFFITH *et al.*, Appellees.
No. 208.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF OF APPELLEES.

The only questions raised by the assignments of error contained in the brief of the appellants in this case, are questions of practice and procedure under the Civil Practice Act of Montana, and the Organic Act of the Territory of May 6, 1864. (See Appellant's Brief, p. 10.)

It is, in effect, conceded by that argument that the *merits* of the case are with the appellees, and that there would be no ground for reversal if the proceeding had been conducted differently in the court below. The view is that, under the decision of this court in *Dunphy* v. *Kleinsmith*, (11 Wall., 610,) the case ought to have been tried by the court alone, without the aid of a jury, and for this error the decree should be reversed.

1. The case, however, may be distinguished from *Dunphy* v. *Kleinsmith*.

That case was one *purely* and *exclusively* of equity jurisdiction. It was a judgment creditor's bill, after execution

returned "*nulla bona*," to set aside an alleged fraudulent assignment of the debtor's property; and was therefore one, as was said by Mr. Justice Bradley, "*necessarily* requiring equitable, as distinguished from legal, relief."

The very foundation of a party's right to relief, in such a case, is that he has *none* at law.

To entitle a judgment creditor to come into a court of equity, for the purpose of having his judgment satisfied out of the equitable assets of his debtor, he must show that he pursued his remedies at law to every available extent, without being able to realize his debt. Such a showing is of the substance of his right to relief by bill in equity.

These principles are well settled in the jurisprudence of the country; and are recognized by this court in the case of *Jones* v. *Green*, (1 Wall., 331.)

The case at bar, however, was not one within the exclusive jurisdiction of a court of equity, as distinguished from a court of law. It was undoubtedly substantially a proceeding to foreclose a mortgage, which is cognizable by a court of equity, and is usually classed among chancery proceedings, where the distinction between the two kinds of suits is observed. But there is nothing in the essential nature of the right involved, which can prevent a court of law from giving relief in respect to the right, in an appropriate form of action, as, for instance, by a common-law proceeding in the nature of a writ of *scire facias* upon the mortgage. This is apparant, from the fact that in the State of Pennsylvania the writ of *scire facias* has been used ever since 1705 as a substitute for the chancery remedy by bill of foreclosure, and in that proceeding, which is conducted from beginning to end as an ordinary action at law, the courts have been ever able to enforce the legal and equitable rights of parties.

In Pennsylvania a *scire facias* upon a mortgage is tried by jury, as other cases at common law. Notice may be given to the *terre tenant* of the mortgaged premises, and he may be made a party to the proceedings, and may set up any available defence on the trial of the *scire facias*.

Why, then, it may be asked, cannot the Territorial Legislature authorize any proceeding, provided for the foreclosure of a mortgage and the sale of the mortgaged property, to be tried as a case at law by a court and jury?

Granted that a case within the *exclusive* jurisdiction of equity, according to the criteria established by the authorities on that subject, must be heard and decided by the judge alone upon his judicial responsibility, and that the Territorial Legislature cannot authorize a jury to participate in the adjudication of the cause, it yet does not follow, from anything decided by this court, so far as we are aware, that the Legislature cannot authorize a trial by jury in a case which is or may be within the *concurrent* jurisdiction of equity.

Suppose the Territorial Legislature had adopted the Pennsylvania practice in cases of mortgages, and had authorized their foreclosure by writs of *scire facias*, would this court declare the Legislature void under the organic act? We perceive nothing in that act to prevent the Territorial Legislature from authorizing any case which is or may be within the *concurrent* jurisdiction of equity and common law, to be proceeded in according to the forms and methods of courts of law. Its power extends "*to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this* (the organic) *act.*" (Sec. 6, Act May 26, 1864; 13 Stats., 88.)

The principles of the act undoubtedly recognize the respective *jurisdictions* of law and equity. But we do not see that they inhibit the Legislature from regulating the remedy and modes of proceedings, according to its discretion, in cases which may be regarded as within the concurrent jurisdictions of the two classes of tribunals.

It cannot *deprive* the courts of the Territory of chancery *jurisdiction*. Nor can it, as this court has decided, authorize a case not cognizable at law, on account of the nature of the right sought to be enforced, to be tried by the court with a jury. But each of these is a very different thing from extending the common law methods of procedure

and trial to cases indifferently of common law and equity cognizance, and abolishing the chancery modes of proceeding in such cases.

It is in accordance with the spirit of the Constitution of the United States and the Judiciary Act of 1789, to extend the right of trial by jury to all cases in which an adequate and complete remedy can be obtained by the common law method of procedure and trial. By the express limitation of the 16th section of the organic Judiciary Act, the courts of the United States are prohibited from sustaining suits in equity in any cases where the common law furnishes a "plain, adequate, and complete remedy."

The Constitution gives a right to a trial of the issues of fact by a jury in such cases.

In view of the experience of the State of Pennsylvania, ever since 1705, in favor of the efficacy of the writ of *scire facias* as a remedy for the foreclosure of mortgages, it cannot be said that the proceeding by bill in equity furnishes any better means of administering justice in such cases.

2. If, then, the proceeding, as instituted and conducted in the District Court of the Territory, was in the nature of a common law proceeding, and could be rightfully conducted as such under the Organic Act, the judgment of the Supreme Court can be brought before this court for review only by writ of error; and the present appeal should be dismissed, therefore, for want of jurisdiction. The mode of bringing up the judgments or decrees of the Territorial Court for review in this court, is, of course, the subject of exclusive legislation by Congress, and it has been regulated by Congress in the 9th section of the Organic Act. (13 Stats. 88.)

3. We submit, also, to the court, that the *defendants* in the suit in the District Court are necessary parties to any valid appeal or writ of error.

The appeal is prosecuted solely by the *intervenors*, Hershfield and Hanauer. (See Rec., p. 3.)

The defendants, Herman and Starr, do not appeal.

The judgment of the District Court was against these de-

fendants, and also affected the intervenors. (Rec., p. 17.)

The record should at least show that the defendants have, in some proper and formal manner, waived the right of appeal, before the court takes jurisdiction on the appeal of the intervenors alone.

If this view is correct, the present appeal must be dismissed.

J. Hubley Ashton,
N. Wilson,
Of Counsel for Appellees.